In the

Supreme Court of the United States

October Term, 1970

No. 500

NELLIE SWARB, et al.,

Appellants,

v.

WILLIAM M. LENNOX, et al.,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF OF THE INTERVENOR DEFENDANTS, MIDDLE ATLANTIC FINANCE ASSOCIATION AND ITS MEMBERS.

MARVIN COMISKY,
PHILIP C. PATTERSON,
BLANK, ROME, KLAUS & COMISKY,
1100 Four Penn Center Plaza,
Philadelphia, Pennsylvania 19103
Attorneys for Appellees.

International, [illegible] Area Code [illegible]

TABLE OF CONTENTS OF BRIEF FOR APPELLEES.

TABLE OF CONTENTS OF BRIEF FOR APPELLEES (Continued).

TABLE OF CITATIONS.

TABLE OF CITATIONS (Continued).

Rules: Page

Pennsylvania Rules of Civil Procedure:

STATEMENT OF QUESTIONS PRESENTED.

1. Does the existing Pennsylvania confession of judgment procedure impose such a substantially different burden upon the debtor, than would be the case if suit were instituted by service of summons and complaint without prior entry of judgment, as to deny due process?

2. Would the alleged constitutional infirmity, if any, be cured if confession of judgment were *preceded* by a judicial finding, after hearing upon notice, that the judgment debtor knowingly, understandingly and intelligently consented to the creditor's right to confess judgment when he signed the debt instrument containing the confession of judgment clause?

3. Would entry of judgment pursuant to a confession of judgment clause in a promissory note be consistent with due process if proceedings to execute on the judgment were *prohibited until after* liability was established at a *de novo* judicial hearing on the merits, upon notice?

4. Since the plaintiffs' proof of lack of knowing and understanding consent of borrowers in signing documents containing confession of judgment clauses was limited to consumers whose incomes were $10,000 or less, and to consumer financing transactions not involving mortgages, did not the District Court correctly exclude borrowers with incomes in excess of $10,000 and mortgage loan borrowers from the class of borrowers benefited by the injunctive decree?

STATEMENT OF THE CASE.

In this Action, instituted against the Sheriff and Prothonotary of Philadelphia County, Pennsylvania, plaintiffs, who are the obligors on notes given by them for consumer financing purposes to sellers or lenders, sought a decree invalidating confession of judgment clauses contained in the notes, on the ground that they had not knowingly and understandingly consented to the confession of judgment procedure. Plaintiffs sued on behalf of all other Pennsylvania residents who had signed notes or contracts containing confession of judgment clauses.

The evidence pertained almost entirely to consumer debtors with incomes of $10,000 or less. Also, hardly any of it pertained to mortgage debtors. Accordingly, the Court excluded mortgage debtors and debtors with incomes in excess of $10,000 from the scope of the decree. As to the debtors not thus excluded, viz., non-mortgage debtors who are consumers and have incomes of $10,000 or less, the Court found that a majority of them do not know or understand the confession of judgment clauses when they sign the loan instruments.

The Court next found that the existing Pennsylvania judgment procedure imposes significant burdens on the judgment debtor with respect to burden of proof, litigation expense and hazard of default, which are not imposed on judgment debtors who are sued by service of complaint and summons without entry of judgment. For this reason, the District Court held that the existing Pennsylvania confession of judgment procedure violates the due process clause of the Fourteenth Amendment as to all judgment debtors who did not make a knowing, understanding and intelligent waiver of their constitutional rights when they signed the debt instruments. The District Court did, however, insert a proviso in its Final Judgment, permitting confession of

judgment when preceded by a judicial determination that the judgment debtor knowingly, intelligently and understandingly waived his constitutional rights when he signed the debt instrument.

Originally, plaintiffs appealed merely from the exclusion of mortgage borrowers and consumer debtors with incomes in excess of $10,000 from the class benefited by the decree and did not appeal from the exclusion of loan transactions when the debtor knew and understood that the debt instrument authorized confession of judgment. Subsequently, however, plaintiffs expanded the scope of their appeal so as to appeal from this latter exclusion. The intervening defendants consented to this expansion of the scope of the appeal, since it is desirable that the issues at stake be resolved as fully as possible.

The intrevening defendants did not appeal from the decision below. The undersigned counsel were nevertheless requested by this Court to file a Brief on the intervening defendants' behalf. Hence both our prior Brief, in support of our Motion to Dismiss, and this Brief.

Although this Brief will demonstrate that the District Court erred in concluding that the existing Pennsylvania procedures pertaining to confession of judgment are unconstitutional absent knowing and understanding consent by the debtor to the authorization to confess judgment, the principal function of this Brief will be to demonstrate how the District Court's objections to the existing confession of judgment procedure can be obviated. Specifically, it is hereinafter demonstrated that, if the Pennsylvania confession of judgment procedure is changed so as to put the debtor in as favorable a position with respect to burden of proof, litigation expense, and hazard of execution sale by default, as he would have been had he been sued without confession of judgment, due process would not be violated

either by the mere entry of a confession of judgment or by a lien resulting therefrom, even if the debtor is not shown to have known and understood that the debt instrument authorized confession of judgment and that a lien on the debtor's realty would result. Lastly, we demonstrate hereinafter that, even if the Court disagrees with the latter conclusion, any due process objections would be removed by proof that the debtor did know and understand both that the debt instrument authorized confession of judgment and that a lien on the debtor's realty would result. In connection with the latter conclusion, we have described various procedural methods for establishing that the debtor knew and understood that confession was authorized and that a lien on realty would result.

When thus purged of the features which the District Court deemed undesirable, viz., the alleged increases in the burden of proof, litigation expense and hazard of default, confession of judgment is not only innocuous from a constitutional standpoint, but is positively desirable from a public interest standpoint. The reason for this is that it enables a lending institution to make a small or moderately-sized loan on a secured basis at much *less* administrative cost (which is imposed upon and paid for by the borrower) than would be incurred had the borrower been required to sign a mortgage. This cost saving inures to the benefit of borrowers, since many borrowers are thereby enabled to secure credit which they could not otherwise secure. Moreover, the lending institution is enabled to and does pass on its cost savings to the borrower, and the borrower is saved the settlement expense which would be incurred were a mortgage given by him. For these economic reasons, a judgment note has been termed "a poor man's mortgage". For all of these reasons, it is *desirable* that the function of a judgment note as a *lien instrument* be preserved, with proper safeguards *before* execution may be authorized.

SUMMARY OF THE ARGUMENT.

The maker of a promissory note has the burden of proof as to every issue that arises with appreciable frequency even when he is sued without confession of judgment. Accordingly, confession of judgment does not substantially increase his burden of proof. Moreover, since the petition to open would serve the function of an answer, since the depositions taken in connection therewith would obviate the need for discovery, and since the hearing on the petition to reopen would take the place of and would render unnecessary a petition for summary judgment and hearing thereon, the overall expense of successfully moving to open a confessed judgment and of then litigating on the merits would not be greater than the expense of defending an action instituted without confession of judgment. Lastly, since a default judgment can be entered twenty-one days after service of a summons and complaint without confession of judgment, and since execution can immediately ensue, the twenty days notice required prior to the scheduling of an execution sale under a confessed judgment (plus the additional advertising that must precede the actual sale) is no more unfavorable to the debtor.

Confession of judgment can also be validated by a business procedure for fully apprising debtors, when they sign judgment notes, that judgment can be confessed thereon.

Lastly, confession of judgment and any resulting lien on real estate would clearly be validated were execution thereon *prohibited* until after the debtor was served and a judicial determination of liability on a complaint was secured, following a hearing at which the burden of proof and expense would be the same as if judgment had not been entered.

ARGUMENT.

Point I.

The Existing Pennsylvania Confession of Judgment Procedure Does Not Impose Such a Substantially Different Burden Upon the Debtor, Than Would Be the Case if the Suit Were Instituted by Service of Summons and Complaint Without Prior Entry of Judgment, as to Deny Due Process.[1]

In the discussion with respect to Point III in our Brief in support of our Motion to Dismiss these appeals, it is demonstrated that, in a suit on a promissory note instituted without confession of judgment, the burden of proof (as well as the burden of going forward with the evidence) is on the defendant with respect to every defense other than the defense of forgery and the defense that the loan was not in fact made. Furthermore, even with respect to the latter two defenses, the burden of going forward with the evidence is on the defendant. Since the latter two defenses are virtually never raised, appellants' argument that the burden of proof is significantly different in connection with a motion to open a confessed judgment is obviously not well founded.

As to the expense factor, the expense of proceeding in connection with a petition to open is completely offset by the fact that these proceedings produce equivalent cost savings in connection with the hearing on the merits which ensues if the judgment is opened. These cost savings are

1. These points are fully discussed on pages 17 through 23 of our Brief in support of our Motion to Dismiss Appellants' appeals, heretofore filed by us with this Court, commencing on the third line from the bottom of page 17 and continuing until the end of page 23. We respectfully refer to and incorporate herein by reference the said discussion in our said Brief.

created by the following factors: (a) the petition to open serves the purpose of an answer, and no answer is required; (b) depositions and affidavits taken in connection with the petition to open would, *pro tanto*, reduce or eliminate the need for discovery proceedings in connection with the hearing on the merits; and (c) any argument held with respect to the petition would take the place of a motion for summary judgment or judgment on the pleadings and would render any such motion unnecessary.

As to the argument that the confession of judgment involves an undue hazard that, within the grace periods available, the debtor will not consult an attorney and will inadvertently permit an execution sale to take place, the answer is that there is just as great a hazard in connection with a suit instituted by summons and complaint without confession of judgment. In such a suit, the plaintiff can enter a default judgment twenty-one days after service of the complaint (Pa. R. C. P. 1037(a)). Immediately thereafter, and even on the same day, he can secure a writ of execution from the prothonotary, Pa. R. C. P. 3102, 3103, 3104. Therefore, real and personal property of the defendant may be simultaneously levied upon. Pa. R. C. P. 3107. Following levy, the personalty levied upon may be sold six days after notice of sale has been given by posting handbills at various specified places, Pa. R. C. P. 3128; and the realty levied upon may be sold twenty-one days after the sale is first advertised, provided it is advertised once a week for three successive weeks in specified publications. Pa. R. C. P. 3129.[2]

Thus, the hazard of inadvertent default, and of a resultant execution sale, are no greater in the case of confession of judgment than they are in the case of a suit instituted without confession of judgment.

---

2. The requirements in Pa. R. C. P. 3128 and 3129 as to posting and advertising are just as applicable to execution sales under judgments entered by confession as they are to any other kind of judgment.

Since the burden of proof, expense, and hazard of inadvertent default are no greater in the case of a judgment entered by confession than they are in the case of a suit instituted without confession of judgment, this Court's decision in *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932), sustaining a judgment entered by confession when the debtor is given an adequate opportunity to litigate any defense before execution sale takes place, is applicable.[3] So, also are the other decisions by this Court, cited on page 17 of our aforesaid prior Brief, in which an *ex parte* judgment, assessment or other adjudication was sustained because the debtor was given an adequate opportunity to litigate any defenses before execution sale took place.[4]

Furthermore, as is made plain both by the foregoing discussion and by the discussion on pages 17 through 23 of our aforesaid prior Brief, even if there is an increase in the burden of proof and/or expense and/or hazard of default, any such increase is not substantial enough to render the Pennsylvania confession of judgment procedure unconstitutional.

That is not to say that a substantial increase in one of these incidents would render the Pennsylvania confession of judgment procedure unconstitutional. On the contrary, this Court's decision in *National Equipment Rental, Ltd. v. Szukhent*, 275 U. S. 314, 84 S. Ct. 411 (1964) demonstrates that even a substantial increase in one or more of these incidents would not cause the Pennsylvania confession of

---

3. See page 16 of our aforesaid prior Brief.

4. It should be noted that both the facts in the case at bar and the facts in the *American Surety* case present a much stronger case for validity of the judgment or assessment than the Supreme Court decisions cited on page 17 of our prior Brief, since, both in the case at bar and in the *American Surety* case, the judgment note itself gave notice that judgment might be confessed without further notice. Nevertheless, the judgment, assessment or other adjudication involved in the Supreme Court decisions cited on page 17 of our prior Brief was held valid by this Court.

judgment procedure to be unconstitional. In that case, a contractual waiver by an equipment lessee of the lessee's constitutional right to be served by personal service in the lessee's home state was sustained, even though the lessee had not read the clause and even though the necessity of defending the action in a distant state would impose a much greater increase in expense than any possible increase in expense which might be incurred by a debtor seeking to open a judgment entered by confession.

We also particularly call the Court's attention to the discussion on pages 21-22 of our said prior Brief, of the holding in *Chester Valley Refrigeration Co. v. Altieri,* 41 Pa. D. & C. 2d (D. P. Monroe Co. 1965), in which the Court specifically held that, since "it is supine negligence not to read the paper before signing it", a judgment entered by confession is not invalidated by the mere fact that the borrower had negligently failed to read the confession of judgment clause.

Point II.

The Alleged Constitutional Infirmity in the Pennsylvania Confession of Judgment Procedure Would Be Cured by Proof Establishing That the Debtor Knew of and Understood the Significance of the Confession of Judgment Clause When He Signed the Debt Instrument.

The District Court's Final Order, Permanent Injunction and Revising Temporary Restraining Order (hereinafter referred to as the District Court's Final Order) was entered on June 16, 1970.

In paragraph B thereof, effective November 1, 1970, the District Court permanently enjoined the defendants and intervening defendants from entering any judgments against members of the class of consumers described in paragraph A

> ". . . unless it has been shown that the signers of such clauses have intentionally, understandingly, and voluntarily waived all the rights lost under Pennsylvania law, as described in the opinion of June 1, 1970, as amended, when executing a document containing such a clause."[5]

In *Brookhart v. Janvis,* 384 U. S. 1, 4 (1966), this Court recognized that constitutional rights can be waived, saying:

> "There is a presumption against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 U. S. 60, 70-71, and for a waiver to be effective it must be clearly established that there was an 'intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U. S. 458, 464.
>
> In deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver."

The District Court, in its opinion, quoted the foregoing excerpt from *Brookhart v. Janvis, supra* and then found that, as to most members of the class benefited by the decree, viz., non-mortgage borrowers who are consumers and have family incomes of $10,000 or less a year, there has heretofore been no waiver, since the Court found that most of them have not known of the presence of the confession of judgment clause when they have signed the debt instruments. See Opinion below, at pages 16-18. Thereafter, the District Court recognized that knowing and understanding consent by a borrower to a confession of judgment clause in the debt

5. The effective date was stated to be November 1, 1970, or "the expiration of the next session of the Pennsylvania General Assembly if the 1970 session has permanently adjourned by the date." Since the Pennsylvania Legislature did not adjourn until after November 1, 1970, the effective date was November 1, 1970.

instrument signed by him would validate the confession of judgment procedure. First, the Court said, at page 18:

> "It is not our function to dictate to a state exactly what constitutes understanding waiver of notice in each particular case and what proof of notice would comply with the above-mentioned decisions. Where the debtor is an attorney, all that may be necessary to prove that he understood the meaning and consequences of such a clause in a consumer financing note is an affidavit of such a debtor's profession. On the other hand, more proof may be required of non-high school graduates since the phraseology of the clause in the notes offered in evidence is most difficult for laymen to understand."

Then, in footnote 24 on page 18 of its Opinion, the District Court pointed out that the federal statutory requirement of proof of non-military service of those against whom judgments are entered had been met in some Pennsylvania Counties by rules similar to Philadelphia Court of Common Pleas Rule 921, which provides for the filing of an affidavit of non-military service and, if the debtor's status is unknown, for the appointment of counsel to make an independent investigation and report to the Court. The District Court then said, in the same footnote in its Opinion:

> "A similar statewide rule or legislation, providing for the filing of proof of intentional understanding and voluntary consent to confessed judgments in order to comply with this opinion is among the methods available to permit use of the confession of judgment clause if Pennsylvania decides to continue this system."

Similarly, in *Osmond v. Spence*, D. Del., Civil Action No. 3940, Final Opinion May 13, 1971, also decided by a three-judge court, the Court unanimously recognized that a confession of judgment clause can be validated by a know-

ing and intelligent waiver, saying (Opinion, footnote on page 19):

> ". . . nor is it for us to say what amount of evidence it will take to overcome the presumption against waiver. This is a matter for judicial determination in each case. We can only point out that, assuming arguendo that less evidence might be necessary to find a waiver of a civil, rather than criminal, right, nevertheless, even in the civil field, the federal courts have insisted that such evidence be of a kind and degree to establish clearly and beyond doubt that the waiver was knowingly and intelligently made".

Thus, confession of judgment pursuant to a confession clause is clearly valid when the debtor knowingly and intelligently consented to it when he signed the debt instrument.

In Section D of their Brief, plaintiffs have made the wholly unsupported contentions: (a) that borrowers in Pennsylvania are unable to obtain loans without being required to sign loan instruments containing confession of judgment clauses; and (b) that, assuming that proposition "(a)" is factually correct, even a knowing and understanding consent to a confession of judgment clause and to a resulting lien on realty should be thereby invalidated. It should first be noted that there is absolutely no record support for proposition "(a)". Certainly, proof that the forms of promissory notes used in loan transactions usually contain a confession of judgment clause does not constitute proof that the lenders are not willing to omit or delete the confession of judgment clause when requested to do so. Our information is to the effect that lending institutions often delete such clauses when requested to do so. Furthermore, there is absolutely no evidence in the record of a

single instance when a lending institution has been requested to omit or delete a confession of judgment clause from the loan instrument.

Moreover, since one of the plaintiffs' witnesses, A. E. Casnoff, testified that his finance company employer "had dropped judgment notes out of a considerable part of its sales finance transactions" and "is prepared to drop judgment notes completely out of its consumer discount transactions" (N. T. 116), the record affirmatively establishes that loans evidenced by loan instruments which do not contain a confession of judgment clause are obtainable.

Accordingly, the factual premise for the "contract of adhesion" argument has not been established.[6]

Point III.

Entry of Judgment Pursuant to a Confession of Judgment Clause in a Promissory Note Would Be Consistent With Due Process If Proceedings to Execute on the Note Were Prohibited Until Liability Was Established at a De Novo Hearing.

A. The Requirement of a De Novo Hearing Prior to Execution Would Obviate Any Possible Constitutional Objection Since the Burden Imposed Upon the Debtor Would Be No Greater Than If Judgment Had Not Been Confessed.

The procedural changes outlined in the heading to this Section would completely take the sting out of confession of judgment, even if the debtor did not know that

6. In addition, plaintiffs have failed to cite a single case to the effect that a particular type of contract provision should automatically be deemed non-enforceable if it is established that the concerns benefited by the provision in question are generally unwilling to delete or omit the clause. This is not the law and never has been the law. A contention identical to plaintiff's "contract of adhesion" contention was rejected, *sub silentio*, by the majority Opinion of this Court in *National Equipment Rental, Ltd. v. Szukhent*, *supra*, 375 U. S. 314, 84 S. Ct. 411 (1964). See Justice Black's dissenting opinion in that case, in which he stated that "it is hardly likely that these Michigan farmers were in a position to dicker over what terms went into the contract they signed."

the debt instrument authorized confession of judgment when he signed the debt instrument, since the confession of judgment procedure would then be a mere method of commencing a litigation and since no greater burden of proof, litigation expense or hazard of default would be imposed on the debtor than if he had been sued without confession of judgment.[7]

In this connection, it should be first noted that, in *American Surety Co. v. Baldwin, supra,* 287 U. S. 156, 53 S. Ct. 98 (1932), this Court sustained a judgment against a surety entered without notice pursuant to a confession of judgment clause in a supersedeas bond, on the grounds: (a) that the surety's act in signing the supersedeas bond constituted "consent" to the confession of judgment clause; and (b) that the entry of judgment was followed by adequate opportunity for a hearing as to its correctness. The Court did not concern itself with, and made no finding with respect to, the question whether the surety had read the bond and learned of and understood the significance of the confession of judgment clause. The court said (at page 168):

> "The practice prescribed was constitutional. Due process requires that there be opportunity to present

7. Under the proposed procedure, a complaint or statement of claim would be served upon the debtor at the time when judgment was confessed. A framework for this method of confessing judgment is already provided for by Pennsylvania Rules of Civil Procedure 2951(b), 2952, 2955, 2956 and 2962, which provide for an alternative procedure under which a complaint and confession of judgment would be filed thereon. The rules could be amended so as to provide that the usual rules applicable to actions instituted without confession of judgment would apply except that: (a) the confessed judgment would constitute a lien upon realty dating from the time when it was entered; (b) any judgment obtained on the complaint would be automatically merged in the confessed judgment, or vice versa; and (c) any lien obtained when the judgment was confessed would survive the said merger of judgments.

> ery available defense; but it need not be before the entry of judgment . . . An appeal on the record which included the bond afforded an adequate opportunity. Thus the entry of judgment was consistent with due process of law."

Similar holdings, sustaining judgments entered by confession, include: *Turner v. Alton Banking & Trust Co.*, 181 F. 2d 899, 905 (8 Cir. 1950); *Bower v. Casanave*, 44 F. Supp. 503, 507 (S. D. N. Y. 1941) and *Levin v. Wenbf*, 7 N. J. Misc. 664, 146 Atl. 789 (1929).

Other cases, in which judgments entered without notice were sustained when there was notice and opportunity to present a defense prior to execution, include: *Coffin Bros. & Co. v. Bennett, Superintendent of Banks for State of Georgia*, 277 U. S. 29, 48 S. Ct. 422 (1928) (assessment against stockholders of insolvent bank); *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 596-7, 51 S. Ct. 608 (1951) (income tax assessment); *Jordan v. American Eagle Fire Ins. Co.*, 169 F. 2d 281 (App. D. C. 1948) (administrative order fixing insurance rates). Cf. *Bianchi v. Morales*, 262 U. S. 170, 43 S. Ct. 526 (1923) (summary mortgage foreclosure proceeding, in which payment was the only defense permitted to be asserted, held constitutional, since a separate suit could be brought to annul the mortgage by reason of any other defense).

B. The Requirement of a De Novo Hearing Prior to Execution Would Validate Confession of Judgment Even If a Lien on Realty Was Created When Judgment Was Confessed.

Furthermore it is equally clear that, under the revised procedure outlined hereinabove, the judgment entered by confession would not be rendered unconstitutional by the mere fact that it created a lien upon the debtor's realty.

Coffin Brothers & Co. v. Bennett, Superintendent of Banks for State of Georgia, 277 U. S. 29, 48 S. Ct. 422 (1928), is squarely in point. In that case, both an assessment levied by the Superintendent of Banks without notice against stockholders of an insolvent bank, and a lien which immediately resulted from the assessment, were held not to constitute a denial of due process, since, following the assessment, the stockholders were given notice that the assessment had been levied and, following issuance of execution, they were given the right to file an affidavit of non-liability and to contest liability in a court trial. According to the United States Supreme Court's Opinion in this case (277 U. S. at page 31):

> "The objection urged by the plaintiffs in error seems to be that this section purports to authorize an execution and the creation of a lien at the beginning, before and without any judicial proceeding. But the stockholders are allowed to raise and try every possible defense by an affidavit of illegality, which, as said by the Supreme Court of Georgia, makes the so-called execution 'a mode only of commencing against them suits to enforce their statutory liability to depositors.' A reasonable opportunity to be heard and to present the defense is given and if a defense is presented the execution is the result of a trial in court. The Fourteenth Amendment is not concerned with the form. Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 42, 46 S. Ct. 384, 70 L. Ed. 818.
>
> *As to the lien, nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit. We see nothing in this case that requires further argument to show that the decision below was right"* [emphasis added]

There is nothing unusual about the acquisition of a judicial or statutory lien prior to judgment or hearing. Other examples include mechanics' liens, materialmen's liens, attorneys' liens, fraudulent debtor's attachments, warehousemen's liens, bankers' liens, liens on the stock of stockholders defaulting in payment of their stock subscriptions, liens in foreign attachments, and the like. E.g.: see *Ownbey v. Morgan*, 256 U. S. 94, 41 S. Ct. 433 (1921), in which the Court sustained the practice of obtaining jurisdiction by foreign attachment.

The Supreme Court's decision in *Sniadach v. Family Finance Corp. of Bay View*, 395 U. S. 337 (1969), invalidating pre-judgment wage garnishment, is distinguishable for two reasons: (a) the element of consent supplied by the power of attorney to confess judgment found in a judgment note was wholly lacking; and (b) the Court indicated that garnishment of wages is *sui generis* and is distinguishable from attachment of any other type of property. The Court held that garnishment of wages causes such "tremendous hardship to wage earners with families to support" (such as "a great drain on the family income") that the loss of the use of the wages should itself be deemed to constitute a taking of property which would constitute a denial of due process when not preceded by notice and opportunity for hearing. In so holding, the Court pointed out that (p. 349):

> "A procedural rule that may satisfy due process *for attachments in general*, see McKay v. McInnes, 279 U. S. 820, does not necessarily satisfy procedural due process in every case" [emphasis added].

Thus, the Court recognzied that pre-judgment attachment of property such as realty, bank accounts, stock certificates, and tangible personalty, and the like, is constitutional, even

if not authorized by any previously executed power of attorney.

A *fortiori*, the creation of a lien on realty *pendente lite*, by confession of judgment under a confession of judgment clause, does not violate due process, even if the debtor did not know that the debt instrument authorized confession of judgment and/or that a judgment confessed thereunder would create a lien on the debtor's realty.

That the element of waiver would be sufficiently supplied by the execution of the note, and that knowledge that the note authorized confession of judgment and that a lien on realty would result therefrom need not be proven, necessarily follows from: (a) the fact that the lien created in the *Coffin* case was held valid even though there had been no prior consent to it; and (b) the fact that the "attachments in general" (i.e., all attachment liens other than wage attachment liens), which the Court in *Sniadach* expressly recognized were not affected by its decision, were not preceded by prior consent.

C. Even if the Requirement of a De Novo Hearing Were Held Not Sufficient Per Se to Validate a Confessed Judgment and a Resulting Lien on Realty, the Confessed Judgment and the Resulting Lien Would Be Validated by Proof That, When He Signed the Debt Instrument, the Debtor Knew and Understood That Confession of Judgment Was Authorized by the Lien Instrument and That a Lien on Realty Would Result.

Even were the Court to reject the proposition set forth in the previous subsection, viz., subsection III(B), to the effect that the de novo hearing procedure would validate not only confession of judgment but also any lien resulting therefrom even if the debtor did not know that confession

of judgment was authorized and that a lien on realty would result, it is clear that any such deficiency would be cured by proof that the debtor did know and understand that confession of judgment was authorized by the instrument and that a lien on realty would result. See section II of this Brief, *supra*.

The most practical and feasible way for a lending institution to establish such a knowing and understanding waiver would be for it to prepare and present to the borrower, at the time of the closing of the loan, a separate form specifically advising the borrower, in prominent type: (a) that the debt instrument authorizes the creditor to enter judgment for the amount due on the debt instrument, without further notice; and (b) that a lien on any of the debtor's realty will automatically be created by entry of the judgment.

Furthermore, the borrower could be required to read the form in the presence of the lending officer, and to certify, in an affidavit on the form, that he had read and understood the contents of the form. Also, the lending officer could be required to certify that the borrower had read the form in his presence and had represented that he understood it.

The foregoing procedures would, we submit, amply satisfy any requirement as to knowing and understanding waiver.

D. The Provisos Qualifying the Retroactive Effect of the Decree Should in Any Event Be Affirmed.

The permanent injunction issued by the District Court was qualified by two provisos, one of which preserved the lien of judgments previously entered by confession, and the other of which provided that confessions might be entered prior to November 1, 1970, upon documents executed prior to the date of the Final Order and Permanent Injunction.

Also, in paragraph D, the District Court modified its prior temporary restraining order so as to permit execution on judgments entered prior to November 1, 1970, provided the state court first determines that the debtor is liable (and gives leave to execute) at a de novo hearing preceded by notice and conducted in accordance with procedural due process, in which event the confessed judgment is to be deemed retroactively valid as of when entered.

These provisos applied the equitable principle that a decision making an unexpected change in the law, as theretofore understood, will be given prospective application only, when retroactive application of it would injure persons who reasonably relied upon the prior rule. *Linkletter v. Walker*, 381 U. S. 618 (1965). See also *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 363 (1932). The preservation of prior liens was particularly appropriate and proper, since many creditors, who have given credit on the assumption that they would obtain liens on realty by confessing judgment, could and otherwise would have required the borrower to execute a mortgage.

For the above reasons, we submit that these provisos should in any event be affirmed.

Point IV.

Since the Plaintiffs' Proof of Lack of Knowing and Understanding Consent of Borrowers in Signing Documents Containing Confession of Judgment Clauses Was Limited to Consumers Whose Incomes Were $10,000 or Less and Consumer Financing Transactions Not Involving Mortgages, the District Court Correctly Excluded Borrowers With Incomes in Excess of $10,000 and Mortgage Loan Borrowers From the Class of Borrowers Benefited by the Injunctive Decree.

The bases for the conclusions set forth in the heading for this Section have been fully set forth and discussed and

supported on pages 3-8 and 10-14 of our Brief in support of our Motion to Dismiss these appeals. We respectfully refer to, and incorporate herein by reference, the discussion on those pages of that Brief.

With respect to the mortgage exception, it should be particularly noted that it is based on the propositions that, at a real estate settlement at which a purchase money mortgage is given, the purchaser is invariably represented and counselled by a real estate broker who is thoroughly familiar with all of the documents signed by the debtor, and is very often represented and counselled by an attorney who is thoroughly familiar with all of these documents.

In addition to urging that the mortgage exception be sustained, we urge that the Court specifically rule: (a) that the presence of an attorney at a real estate or loan settlement supplies the element of a knowing, intelligent and understanding waiver, since it may certainly be presumed that the attorney knows of the presence and contents of the confession clause in the note or bond and understands its significance, and since the knowledge of the attorney should be imputed to his client; and (b) that, for the very same reasons, the presence of a real estate broker supplies the element of a knowing, intelligent and understanding waiver.

CONCLUSION.

1. The District Court incorrectly found that the burden of proof, litigation expense and hazard of default of seeking relief from a confessed judgment in Pennsylvania are so substantially increased that such a judgment is unconstitutional unless the debtor knowingly and understandingly consented to the authorization to confess judgment. The said finding was erroneous, since, in fact, neither the burden of proof, nor the litigation expense, nor the hazard of default, is substantially increased. Furthermore, even had one or more of these burdens been substantially increased, confession of judgment would nevertheless have been constitutional, in view of the waiver contained in the confession of judgment clause in the debt instrument executed and delivered by the borrower.

2. On the other hand, the District Court correctly found that confession of judgment in Pennsylvania is constitutional if the debtor knew and understood that the loan instrument authorized confession of judgment.

3. Any constitutional objections to the existing Pennsylvania procedure pertaining to confession of judgment would be completely obviated by a procedure precluding execution sale unless plaintiff serves a complaint and summons and secures a judicial determination of liability after giving plaintiff an opportunity to automatically open the judgment and to litigate on the merits without incurring any change in burden of proof, litigation expense, or hazard of default. This would be so regardless whether the debtor knew that the debt instrument authorized confession of judgment. Furthermore, these two conclusions would be correct regardless whether a lien on realty was created or not. Moreover, even if the creation of a lien was deemed otherwise objectionable, proof that the debtor knew and

understood that the debt instrument authorized confession of judgment and that a lien on realty would automatically result therefrom would cure any such constitutional objection.

4. The District Court correctly excluded mortgage borrowers and consumer borrowers with incomes in excess of $10,000 from the class benefited by the decree, since there was no appreciable evidence in support of plaintiffs' contentions with respect to the two groups.

Respectfully submitted,

MARVIN COMISKY,
PHILIP C. PATTERSON,
1100 Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103
Attorneys for Appellees.

Of Counsel:
BLANK, ROME, KLAUS & COMISKY.